

## State of North Carolina

Department of Justice PO Box 629 RALEIGH, NORTH CAROLINA 27602-0629 REPLY TO:
L. MCNEIL CHESTNUT
SERVICES TO STATE AGENCIES
PHONE: 919.716.6800
FAX: 919.716.0584
E-MAIL: MCHEST@NCDOJ.GOV

2 June 2012

Jennifer Percy Counsel North Carolina Housing Finance Agency 3508 Bush Street Raleigh, North Carolina 27609

Re: Advisory Letter - - Administration of Project-based Contracts for HUD Section 8 Rental Subsidies Statewide

Dear Ms. Percy:

ROY COOPER

ATTORNEY GENERAL

This will respond to your request on behalf of the North Carolina Housing Finance Agency ("NCHFA") for an opinion from the Office of the Attorney General on the question of whether or not the NCHFA is the only entity authorized under North Carolina law to be the administrator of a Project-Based Section 8 Housing Assistance Payments contract in this State. For the reasons expressed below, it is my opinion that the NCHFA is the only entity in this State with the exclusive authority to administer a statewide Project-Based Section 8 contract.

## 1. Factual Background.

By way of background, we understand that the Project-Based Section 8 Housing Assistance Payments program was created by the Housing and Community Development Act of 1974. The Housing Assistance Payments program is a rent subsidy program that assists eligible low income families in obtaining decent, safe and sanitary housing. Families receive the benefit of a rent subsidy, known as a housing assistance payment, equal to the difference between their share of the rent and the rent charged by the owner. Owners, who may be public or private, receive the housing assistance payments directly from the United States Department of Housing and Urban Development ("HUD") or one of its Performance-Based Contract Administrators ("Contract Administrator").<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Housing and Community Development Act of 1974, 42 U.S.C. §§5301-5321.

<sup>&</sup>lt;sup>2</sup> 42 U.S.C. § 1437f.

NCHFA has served as Contract Administrator in North Carolina for over ten years. As Contract Administrator, NCHFA is responsible for annual on-site visits to properties, monthly desk reviews, adjustments to rents, reviews of utility allowances and advising and assisting property owners in over 600 properties located throughout this State.

Currently, HUD is engaging in a new competitive process to select Performance-Based Contract Administrators for its Housing Assistance Payments contracts in each state. HUD has issued a Fiscal Year 2012 Notice of Funding Availability for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts ("NOFA") wherein it announced that it would select one Contract Administrator for each state to operate statewide.<sup>3</sup>

The NOFA states it will only accept applications from legally qualified "public housing agencies". Under 42 U.S.C. section 1437a(b)(6)(A), "public housing agency" is defined, for purposes of the project-based rental assistance program, as "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." In the NOFA, HUD further defines a qualified in-state applicant as an applicant formed under the laws of the same state which must demonstrate that it (a) satisfies the definition of "public housing agency" in section 3(b)(6)(A) of the 1937 Housing Act, and (b) has the legal authority to operate throughout the entire state. HUD has also stated that it will consider applications submitted by joint ventures and other public/private partnerships between public housing authorities and other public or private for-profit or non-profit entities provided they met the above requirements. According to the NOFA, HUD will select one Performance-Based Contract Administrator in each state (except California) to enter into a single Performance-Based Annual Contract to administer the contracts with owners of Section 8 projects statewide.

NCHFA has reason to believe that a housing authority created under Chapter 157 of the North Carolina General Statutes ("Housing Authorities Law") may either (1) apply directly to HUD in response to the NOFA, or (2) form a new entity comprised of a partnership between a local housing authority and another for-profit or non-profit entity to apply. NCHFA has questioned if a local housing authority created under Chapter 157, or a newly formed entity as described above, has the legal authority to act *statewide* as a qualified public housing agency as required by the NOFA. It is my opinion that any such entity will not have the authority to act statewide.

<sup>&</sup>lt;sup>3</sup> DEP'T OF HOUS. AND URBAN DEV, NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE PERFORMANCE-BASED CONTRACT ADMINISTRATOR (PBCA) PROGRAM FOR THE ADMINISTRATION OF PROJECT-BASED SECTION 8 HOUSING ASSISTANCE PAYMENT CONTRACTS, Docket No. FR-5600-N-33 (2012).

<sup>&</sup>lt;sup>4</sup> *Id.* at 7.

<sup>&</sup>lt;sup>5</sup> 42 U.S.C. § 1437a(b)(6)(A).

<sup>&</sup>lt;sup>6</sup> DEP'T OF HOUS. AND URBAN DEV., Docket No. FR-5600-N-33 at 4.

<sup>&</sup>lt;sup>7</sup> *Id*, at 4-5.

<sup>&</sup>lt;sup>8</sup> *Id.* at 7.

The General Assembly created NCHFA when it enacted the North Carolina Housing Finance Agency Act. NCHFA is a body politic and corporate, and it is a public agency and an instrumentality of the State for the performance of essential public functions. 10 NCHFA exists, inter alia, to address the serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons and families of lower income throughout the state of North Carolina.11

We have reviewed the NCHFA's view of the matter expressed in your letter of April 4, 2012, and concur that the Housing Finance Agency Act confers the necessary power and authority for NCHFA to qualify as a public housing authority pursuant to the Housing Act of 1937. For example, to effectuate its purposes, NCHFA has the power, inter alia, to participate in any federally assisted lease program for housing for persons of lower income under any federal legislation, including without limitation, section 8 of the National Housing Act<sup>13</sup>; to make or participate in the making of mortgage loans;<sup>14</sup> to acquire on a temporary basis real property; 15 to procure insurance; 16 to borrower money; 17 to provide technical and advisory services to sponsors, builders and developers of residential housing and to residents thereof;18 to enter into contracts and other instruments necessary or convenient in the exercise of its powers and functions; <sup>19</sup> to receive, administer and comply with the conditions and requirements respecting any appropriation;<sup>20</sup> to sue and be sued in its own name;<sup>21</sup> to employ consultants and employee;<sup>22</sup> to advise the Governor regarding the coordination of public and private low-and moderate-income housing programs;<sup>23</sup> to participate in and administer federal housing programs;<sup>24</sup> as well as to have "all of the powers necessary or convenient to carry out the provisions of this Chapter."25

Furthermore, we conclude that the Housing Finance Agency Act explicitly grants NCHFA the authority to operate throughout the entire State of North Carolina. NCHFA was established and empowered to act on behalf of the State of North Carolina and its people in serving this public purpose for the benefit of the general public.<sup>26</sup> It is clear that the intent of the General Assembly was to establish NCHFA to act statewide by the

<sup>9</sup> N.C. Gen. Stat. §122A.

<sup>&</sup>lt;sup>10</sup> §122A-4(a).

<sup>11 §122</sup>A-2.

<sup>&</sup>lt;sup>12</sup> 42 U.S.C. §§1437a(6).

<sup>&</sup>lt;sup>13</sup> N.C. Gen. Stat. §122A-5(1).

<sup>&</sup>lt;sup>14</sup> §122A-5(2).

<sup>15 §122</sup>A-5(6).

<sup>&</sup>lt;sup>16</sup> §122A-5(8).

<sup>&</sup>lt;sup>17</sup> §122A-5(10).

<sup>&</sup>lt;sup>18</sup> §122A-5(13).

<sup>&</sup>lt;sup>19</sup> §122A-5(15). <sup>20</sup> §122A-5(16).

<sup>&</sup>lt;sup>21</sup> §122A-5(17).

<sup>&</sup>lt;sup>22</sup> §122A-5(21).

<sup>&</sup>lt;sup>23</sup> §122A-5(24).

<sup>&</sup>lt;sup>24</sup> §122A-5(25).

<sup>&</sup>lt;sup>25</sup> §122A-5.

<sup>&</sup>lt;sup>26</sup> §122A-4(a).

numerous references throughout the Housing Finance Agency Act that it act: "on behalf of the State of North Carolina"; for "the benefit of the people of the State"; to promote "sound growth of North Carolina communities"; to assist in eliminating and preventing blight "throughout North Carolina." Nothing in the Housing Finance Agency Law limits NCHFA's authority to act anywhere within the State of North Carolina.

In sum, the General Assembly has determined that providing affordable housing statewide, especially in rural areas, is necessary to the health, safety and welfare and prosperity of all residents of the State and to the sound growth of North Carolina communities and has therefore provided for broad sweeping powers to NCHFA to fulfill such purposes. These powers include those necessary to administer Project-Based Section 8 Housing Assistance Payments through the entire State of North Carolina. Moreover, the General Assembly has given NCHFA explicit authority to enter into contacts with any governmental agency, including the United States government and to participate in and administer federal housing programs.<sup>28</sup>

Local housing authorities in North Carolina are also creatures of state law.<sup>29</sup> After a thorough examination of the Housing Finance Agency Law, the Housing Act and the Housing Authorities Law, we have concluded that a local housing authority's jurisdiction is limited to a particular geographic area (city, county or region).

A housing authority may only be formed if any 25 residents of a city file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. 30 After the petition is filed there must be a public hearing at which the legislative body charged with governing the city will determine the need for said authority.31 If approved, the legislative body must adopt a resolution and the mayor must then appoint commissioners to act as an authority. The commissioners then must file an application with the Secretary of State.<sup>32</sup>

Throughout the Housing Authorities Law there are explicit geographic limitations placed on housing authorities that prohibit a housing authority from operating statewide. For example the powers of a housing authority and is replete with qualifying language such as "within [the authority's] boundaries" or "within its territorial limits." 33

Furthermore, the area of operation or territorial limits of housing authorities are explicitly set forth by statute for each of the three types of housing authorities:

<sup>&</sup>lt;sup>27</sup> §122A-2. <sup>28</sup> §122A-5(25). <sup>29</sup> §157-4.

<sup>&</sup>lt;sup>30</sup> *Id*.

<sup>&</sup>lt;sup>31</sup> *Id.* 

<sup>&</sup>lt;sup>32</sup> *Id*.

<sup>&</sup>lt;sup>33</sup> § 157-9.

- (1) City housing authority: area of operation "shall include said city and the area within 10 miles from the territorial boundaries of said city"<sup>34</sup> and it may operate "within any other city that has a common boundary . . . when requested to do so by resolution" of the other city.<sup>35</sup>
- (2) County housing authority: area of operation "shall include all of the county for which it is created."36
- (3) Regional housing authority: possesses authority "within [its] area of operation," 37 which is defined as including "all of the counties for which such regional housing authority is created and established."38

Although a housing authority may form a corporation under the laws of North Carolina, it can only exercise the powers conferred upon the housing authority in Chapter 157.39 I am not aware of any means under existing statutes for creating a housing authority with authority to operate statewide. Nor am I aware of any means by which a housing authority could create a separate instrumentality under North Carolina law that would allow it to operate statewide. Therefore, any new entity formed under the laws of the State of North Carolina which consists of a local housing authority and another for profit or non-profit entity would not qualify as a statewide Contract Administrator because the local the authority is still restricted from operating statewide.

## II. Conclusion.

For the reasons expressed, I conclude that the NCHFA (1) is clearly a "public housing agency" under 42 U.S.C. §1437a(b)(6)(A); and (2) it is the only public housing agency authorized to administer Project-Based Section 8 Housing Assistance Payments contracts throughout the entire State of North Carolina in that the General Assembly has not created any other entity with the authority to administer a statewide Project-Based Section 8 contract.

I trust this responds to your inquiry to our office. If I may be of further assistance, please let me know. This is an advisory letter based on the information you provided to us and our research into the matter. It is not been prepared in accordance with the procedures for a more formal opinion from the Office of the Attorney General.

 $<sup>^{34}</sup>_{35}$  §157-39.1(a). Id.

<sup>&</sup>lt;sup>37</sup> §157-37.

<sup>&</sup>lt;sup>38</sup> §157-39.1(a)

<sup>&</sup>lt;sup>39</sup> §157-9.

## With best regards, I am

Sincerely yours)

L. McNeil Chestnut

Special Deputy Attorney General